

# VU Research Portal

## Governance and the Public-Private Law Divide in the Netherlands

van Ommeren, F.J.

### ***published in***

Law & Governance. Beyond the Public-Private Law Divide?  
2013

### ***document version***

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

### ***citation for published version (APA)***

van Ommeren, F. J. (2013). Governance and the Public-Private Law Divide in the Netherlands. In A. L. B. Colombi Ciacchi, M. A. Heldeweg, B. M. J. van der Meulen, & A. R. Neerhof (Eds.), *Law & Governance. Beyond the Public-Private Law Divide?* (pp. 1-23). Eleven International Publishing.

### **General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

### **Take down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

### **E-mail address:**

[vuresearchportal.ub@vu.nl](mailto:vuresearchportal.ub@vu.nl)

# Governance and the Public-Private Law Divide in the Netherlands

---

Prof. Dr. Frank J. van Ommeren\*

## 1. Introduction

The Law and Governance-approach has a very wide scope.<sup>1</sup> For public law jurists, this approach entails a broadening of the field of study, which briefly is referred to as the 'shift from government to governance' in the public domain.<sup>2</sup> In the Law and Governance-approach of the public domain objects of study are not only governmental organisations performing public law actions but rather *all* institutions that more or less exercise a *public function*. In addition to the government performing public law actions, one could think of the government performing *private* law actions and of the many *private organisations* exercising a public function. In this contribution, much attention will be paid to the government performing private law actions; however, the role of private organisations exercising a public function will also be dealt with. This broadening of the scope of study raises questions about the nature of the law that is applicable on these heterogeneous parties. How should the public-private law divide be understood? Whereas the classical approach has been traditionally limited to public law, because of this paradigm shift, private law has come into the spotlight.

There is much to say about this 'Law and Governance-approach'. In this contribution, I will restrict myself to one specific aspect of this approach. I challenge the – often heard – idea that this approach would involve the end of

---

\* Prof. Dr. Frank J. van Ommeren is Professor of Constitutional and Administrative Law, VU University Amsterdam, Centre for Law and Governance.

<sup>1</sup> See more extensively F.J. van Ommeren, Law and Governance in the Public Domain. A Conceptual Analysis of the Juridical Meaning of Governance and Governance-Areas, in A. Colombi Ciacchi (Ed.), *Governance Meets Law*, Cambridge University Press, 2014 (forthcoming).

<sup>2</sup> This contribution is based on my presentation at the Workshop on the Public-Private Law Divide of the third annual NILG conference (29 November 2011). The shift from government to governance was subject to one of the propositions that were discussed at this workshop.

the relevance of the public-private law divide or at least reduces its relevance.<sup>3</sup> Right from the outset, I would like to assert that I do not agree with this view. In my opinion, it is useful to study the law from a Law and Governance-perspective *and* it is at the same quite possible and even desirable to retain the public-private law divide.

In this contribution, the primary question is how the public-private law divide should be regarded. How should the relationship between public law and private law be understood? To what extent is public law or private law exclusively applicable – for example when the government commits an unlawful act (tort) or concludes a contract? Or could we apply public law and private law at the same time? This analysis of the public-private law divide offers a foundation to answer the key-question: is it still possible in a Law and Governance-approach to respect the classic public-private law divide under Dutch law?

As far as the public-private law divide in the Netherlands is concerned, I will first discuss the traditional view (section 2), and then I examine the more modern visions on the relationship between public law and private law (section 3).<sup>4</sup> There is a plenitude of literature about this topic. However, because of the limited space I will discuss the opinion of only one author on each of these visions. I will indicate to what extent each vision contains law in action. Thereafter, I will explain why the classical view had to make space for other visions on the public-private law divide (section 4). Finally, I will return to the Law and Governance-approach: how should the modern view on the public-private law divide be reconciled with the governance approach of law (section 5)? I consider it as attractive that the law in the governance-sectors could be regarded from the same multi-layered structure as the law in general; encouraging the view that the public-private law divide in these sectors could be analysed in the same way. This will also be revealed in the summary and conclusions (section 6).

---

<sup>3</sup> See *inter alia* C. Möllers, 'European Governance: Meaning and Value of a Concept', *CML Rev.* 2006, Vol. 43, p. 315, 316 and C.E. du Perron, Normen tussen publiekrecht en privaatrecht, in O.O. Cherednychenko (Eds.), *Het publieke van het privaatrecht: hoe regulering van publieke belangen het privaatrecht beïnvloedt*, Den Haag, Boom, 2013, p. 16. See more generally D.M. Curtin, *Europese integratie*, preadvies NJV, Deventer, Kluwer, 2006, p. 40 *et seq.*

<sup>4</sup> The sections 2 up to 4 are mainly derived from: F.J. van Ommeren, 'Een andere visie op de verhouding tussen publiek- en privaatrecht. Van de 'gemene rechtsleer' naar de 'gemeenschappelijke rechtsleer'', *Ars Aequi* 2012, p. 562-572.

## 2. The Traditional View on the Public-Private Law Divide

### 2.1 The General Law Doctrine

Traditionally, in Dutch law the public-private law divide is based on the general law doctrine (*gemene rechtsleer*). According to this doctrine, private law is the general law that is *always* applicable, unless rules of administrative law exist which derogate from private law. Several authors in the first half of the last century have articulated the general law doctrine (especially in the 20's and 30's). Paul Scholten delivers a well-known account in his General Part (*Algemeen deel*) of the famous *Asser-serie*.<sup>5</sup> In his view, administrative law, as a special branch of law, stands opposite to general law. However administrative law is not of a different nature than private law. When there is a loophole in the administrative law, the private law rules are applicable.<sup>6</sup> Consequently, under these circumstances private law operates as a legal safety net.

However, Scholten does make a fundamental difference between *constitutional* law and the rest of remaining so-called public law (*overige zogenaamde staatsrecht*). He considers constitutional law to be of a substantially different character than the other parts of law, due to its close relationship with the organization of the community itself.<sup>7</sup> If we leave constitutional law aside, it appears that the other public law – nowadays we speak of administrative law<sup>8</sup> – is not, in Scholten's view, of another *nature* than private law. He does not make a substantial differentiation between administrative law and private law. This is of great importance. Due to the fact that these two fields of law are considered not to be of a fundamentally different character, the above-mentioned assumption of the general law doctrine is applicable: when administrative law is lacking, private law can – specifically since it is not of a fundamentally different nature – provide a safety net, especially in all those areas where the government has no public powers.

It is useful to depict the general law doctrine schematically. This makes it easier to distinguish the general law doctrine from the other doctrines on the public-private divide. In diagram form, the general law doctrine looks as follows:

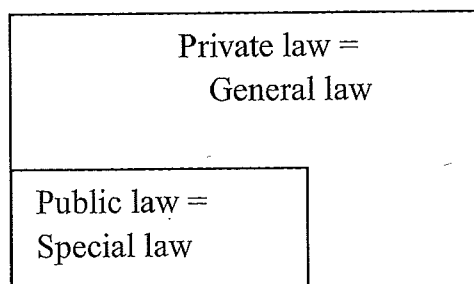
---

<sup>5</sup> Asser-Scholten, *Algemeen deel*, 3<sup>rd</sup> edn, Zwolle, 1974, p. 26 *et seq.* See also F.G. Scheltema, 'Het grensterrein van publiek- en privaatrecht', *RM Themis*, 1927, p. 233 *et seq.* An overview of the general law doctrine offers D.A. Lubach, *Beleidsvereenkomsten*, diss. RUG, Deventer, Kluwer, 1982, p. 74 *et seq.* See also R.J.N. Schlössels & S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat* (6th edn.), Deventer, Kluwer, 2010, p. 503 *et seq.*

<sup>6</sup> Asser-Scholten 1974, p. 31, 32.

<sup>7</sup> Asser-Scholten 1974, p. 28, 31.

<sup>8</sup> Criminal law is, in his eyes, not a part of ordinary public law, see Asser-Scholten 1974, p. 31.



### General Law Doctrine

Although nowadays there are many different opinions regarding the validity of the general law doctrine, this doctrine is still currently reflected in various parts of Dutch law to this very day.<sup>9</sup> Thus, in case of a wrongful governmental act (tort), the civil court in principle applies section 6:162 of the Civil Code, unless special rules of public law are applicable. This occurs because specific legal regulations for wrongful governmental acts (torts) do not exist. Something similar holds for governmental contracts: in principle the general rules of the Civil Code (section 6:213 CC and further) are applicable to their conclusion, form and content. This is only different when specific rules of public law apply, such as 'Wet Gemeenschappelijke Regelingen' for mutual agreements between governmental authorities.

It is likely that these examples seem quite obvious – irrespective of whether or not they concern unlawful governmental actions, governmental contracts or very different examples. Consciously or unconsciously, many Dutch lawyers follow the approach that is offered by the general law doctrine, even when they are not familiar with the expression 'general law doctrine'. Nevertheless, it is worthwhile remembering that the general law doctrine is less obvious than it seems. This becomes clear by looking at the case law from other eras or other countries in which the general law doctrine is not applied. For example, in the Netherlands there are well-known judgments from the late 19th century in which the Civil Code (s. 1401 Civil Code (old) – the forerunner of s. 6:162 CC) was not applicable to governmental actions.<sup>10</sup> France does not currently adhere the general law doctrine. A famous and still valid judgment is the classic French

<sup>9</sup> According to *inter alia* N. Koeman, P. Scholten, 'Algemeen Deel in de Asser-serie', *NTB* 2007, 13, p. 68-69, also included in H. Peters, *Oude Meesters*, Deventer: Kluwer 2009, p. 47 *et seq.*, the general law doctrine is still part of the Dutch positive law. However, see section 3, where an alternative doctrine is discussed.

<sup>10</sup> *Vrouw v. Elske*, W 6817 (HR 29 May 1896) and *Rhedense v. Koe*, W 7116 (HR 21 April 1898). See also J. van der Hoeven, *De drie dimensies van het bestuursrecht. Ontstaan en vorming van het Nederlandse algemene bestuursrecht*, Alphen aan den Rijn, Samson H.D. Tjeenk Willink, 1989, p. 143, 144 (VAR-series 100). HR is the abbreviation for Hoge Raad (Supreme Court).

case about the girl Blanco who was hit by a trolley of the State tobacco company. The accident was caused in the context of the '*service public*' (public service) so the Civil Code was not applicable and therefore the father of the girl could not bring a case against the State before the civil court.<sup>11</sup>

All in all, two elements are essential to the general law doctrine. First, administrative law is not of a fundamentally different nature than private law. And secondly, despite the absence of a profound difference, private law is conceived as the general law and administrative law is conceived as the special law. This purports that private law can fill the gap if and when applicable administrative legal rules are missing or lacking.

## 2.2 *The Mixed Law Doctrine*

The general law doctrine explains much about the applicability of the rules of private law in legal relationships with the government, but very little about the applicability of public law rules. Therefore, we should look at the *mixed law doctrine* (*gemengde rechtsleer*) to answer this question. According to this theory, both rules that originate from public law and private law can be applied in one legal relationship at the same time. This phenomenon is referred to as an osmosis ("*osmose*") of public law and private law.<sup>12</sup>

To some extent, the general law doctrine already assumed a certain mix of legal rules. Since 1924, the Dutch Supreme Court accepts that the government can commit an unlawful act under the Civil Code by acting in conflict with *written* rules of public law.<sup>13</sup> For a long time, however, governmental action was not or only marginally reviewed against *unwritten* rules of public law. This changed in 1986/1987 when the Supreme Court in the landmark case of *Amsterdam v Ikon*, ruled that the general principles of proper administration, and particularly the legal principle of equality, were directly applicable to governmental actions based on private law.<sup>14</sup>

---

<sup>11</sup> Tribunal des Conflits, Les grands arrêts de la jurisprudence administrative, No. 1, 8 February 1873 (Blanco).

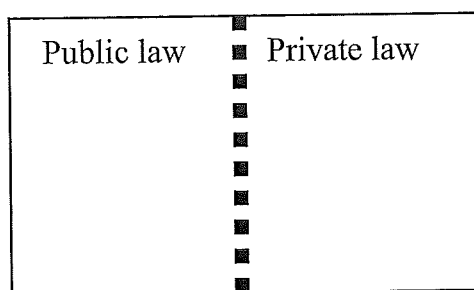
<sup>12</sup> E. Huisman (Eds), 'Osmose tussen publiek- en privaatrecht', *Ars Aequi*, No. 5, 1987 (Special Edition), p. 273-372.

<sup>13</sup> *Ostermann*, HR 20 November 1924, NJ 1925, 89, AB Klassiek, 5th edn, Deventer, Kluwer, 2003, p. 24 *et seq.*  
NJ means *Nederlandse Jurisprudentie* (Dutch Law Reports).

<sup>14</sup> *Amsterdam v Ikon*, AB 1987, 273 (HR 27 March 1987), AB Klassiek, 6th edn, Deventer, Kluwer 2009, No. 13, p. 193 *et seq.* AB means *Administratiefrechtelijke Beslissingen* (Dutch Administrative Law Reports).

Therefore this era is regarded as the beginning of the mixed law doctrine.<sup>15</sup> Soon thereafter, the court also directly applied other written and unwritten norms and standards of public law origin, including fundamental rights, in other governmental private law actions.<sup>16</sup> This demands that *all* governmental *private law* actions be subjected to the standards of public origin.<sup>17</sup> For example, very open private law standards, such as reasonableness, fairness and the duty of care, become more specified by using the more differentiated general principles of proper administration and fundamental rights at the same time.<sup>18</sup> This is a characteristic of the mixed law doctrine. According to this doctrine, a combination of the applicability of public and private law standards is a rather common phenomenon.

The line of reasoning inherent in the mixed law doctrine is also expressed in various places by legislation, especially in section 3:14 Civil Code and section 3:1(2) General Administrative Law Act (GALA). The mixed law doctrine is illustrated as follows:



**The Mixed Law Doctrine**

The mixed law doctrine has of course also received much attention in legal literature. Although Van der Hoeven did not use the expression 'mixed law doctrine',<sup>19</sup> he is considered to be the founding father of this doctrine. In his groundbreaking article 'The Magical Line' ('De magische lijn'), he argued that there are no fundamental reasons to any longer distinguish between public law

<sup>15</sup> One year before the *Amsterdam v. Ikon* judgment, D.A. Lubach, *Bestuursrecht en (nieuw) burgerlijk recht*, preadvies VAR 1986, Alphen aan den Rijn, Samsom H.D. Tjeenk Willink, p. 14, considered the development from the general law doctrine to the mixed law doctrine 'almost completed' (vrijwel voltooid).

<sup>16</sup> See especially *Rasti Rostelli*, HR 26 April 1996, AB 1996, 327.

<sup>17</sup> However, this does not mean that the (formal) general principles of proper administration are always decisive.

Cf. HR 9 april 1999, AB 2000, 36 m.nt. ThGD (*Coevorden v. Gasfabriek*). M.nt. ('met noot') means: with case comment by.

<sup>18</sup> For instance, very illuminating is HR 9 January 1998, NJ 1998, 363 m.nt. ARB (*Apeldoorn v. Duisterhof*).

<sup>19</sup> For this expression, see specifically Lubach 1986, p. 13.



and private law.<sup>20</sup> He also contested the idea that private law is general law and administrative law is special law.<sup>21</sup> Instead of dividing the law into private law and public law in the traditional sense, in his view, the applicability of legal norms is determined by the question whether or not a public function is being exercised. Van der Hoeven argues that the fact that an act is part of a public function affects the content of the standards of law that are applicable, irrespective of whether they are of private or public law origin in the classic sense. It purports that private law standards, when applied to such relationships, are influenced by this (they will assimilate 'public' elements); and that public law sometimes shows the opposite phenomenon (it will show features of 'private' law).<sup>22</sup>

However, case law has not yet been decided in Van der Hoeven's favour. The consequence of Van der Hoeven's approach is not only that applicable standards of law are of a mixed nature when the government performs a public function with private law actions, but also that the law acquires this mixed character if *non-governmental* bodies exercise a public function. The latter is not the case in practised law. In short: the general principles of proper administration are not applicable to private institutions performing a public function,<sup>23</sup> e.g. housing corporations, (private) educational institutes, (private) health services or privatized institutions, etc. This is a notion that is of special interest in a Law and Governance-approach. That is why I shall return to this in section 5.

The applicability of fundamental *rights* in civil relationships has attracted quite some attention. Although the general principles of proper administration are applicable exclusively when the government acts, this can be different for other norms and standards from public law origin. Fundamental rights under circumstances are also applicable to institutions that are not part of the government. This is referred to as the *constitutionalization* of private law.<sup>24</sup>

All in all, the mixed law doctrine builds upon the foundation of the general law doctrine. Although the mixed law doctrine has its own label, it does not imply a major break with the past. The mixed law doctrine provides an extension to the general law doctrine, without nullifying the latter. In both doctrines it is assumed that administrative law and private law are not of a significantly different nature. No fundamental division is made. The mixed law doctrine emphasizes this

---

<sup>20</sup> J. van der Hoeven, *De magische lijn. Verkenningen op de grens van publiek- en privaatrecht*, in *Honderd Jaar rechtsleven, De Nederlandse Juristen-Vereniging 1870 – 1970*, Zwolle, W.E.J. Tjeenk Willink, 1970, p. 218.

<sup>21</sup> Van der Hoeven 1970, p. 203.

<sup>22</sup> Van der Hoeven 1970, p. 218.

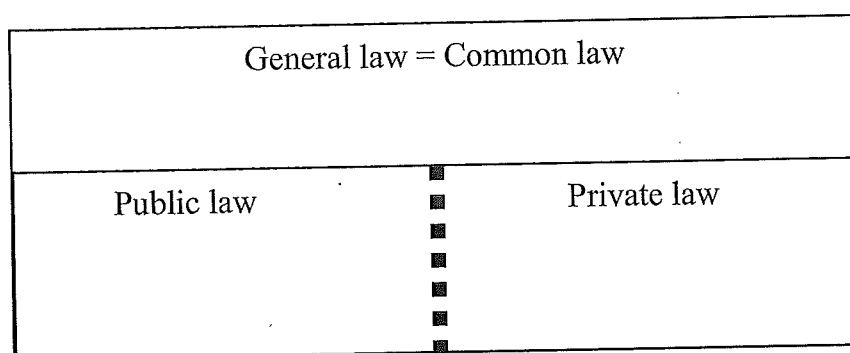
<sup>23</sup> Cf. HR 4 April 2003, AB 2003, 365 m.nt. FvO RZG/ Comformed.

<sup>24</sup> See O. Cherednychenko, *Fundamental Rights, Contract Law and Protection of the Weaker Party*, Utrecht, Munich, 2007 and C. Mak, *Fundamental Rights in European Contract Law*, The Netherlands, Wolters Kluwer, 2008.



exactly for the *reason* that it is quite possible that the applicable law in a certain legal relationship is of a mixed nature and therefore both of private law and public law origin.

The transition from the traditional to the modern visions on the public-private law divide, takes place rather gradually. The mixed law doctrine has also created room for the idea that a number of legal principles and traditional legal concepts, such as liability and contract, are of a common nature rather than of a typical private law nature, which analytically precedes the distinction between public law and private law.<sup>25</sup> In a picture, this idea would look like this:



However, in positive law this insight did not immediately lead to clear effects, these would only appear later. It is a line of thinking that is continually reflected in the new views on the public-private law divide, which will be discussed presently.

### 3. Another View on the Public-Private Law Divide

#### 3.1 Introduction to the Modern Views

In the last ten to fifteen years, there have been several developments that resulted in increasingly distance from both the general law and mixed law doctrines. These developments, which will be discussed hereafter, are not yet fully crystallized. Therefore, there is less agreement in literature on how these

<sup>25</sup> See more generally A.R. Bloembergen, 'De eenheid van privaatrecht en administratief recht', *WPNR* 1977, No. 5372-5375 and A.R. Bloembergen, 'Overheidsprivaatrecht: schets van een algemeen deel', *WPNR* 1992, No. 6074, p. 950 *et seq.* Specifically Lubach 1982, p. 273 early argued that the concept of contract should be considered as such.

new developments must be represented and valued. However, from the outset it is important to keep in mind that these new visions have essentially common characteristics, both articulating a *fundamental distinction* between public law and private law. This is an important difference with the general law and mixed law doctrines.

### **3.2. The Common Law Doctrine**

#### *a. The Legislator*

We come across another approach of the public-private law divide that differs from the general law and the mixed law doctrines, and was adopted by the legislator while drafting the General Administrative Law Act (GALA). Immediate cause for giving an opinion on the public-private law divide was the inclusion of a chapter on administrative financial debts (*bestuurlijke geldschulden*) in the GALA. The introduction of this chapter in the GALA raised the question of the relationship with the rules of the Civil Code that also apply to financial debts. It is worthwhile quoting the next consideration from the Explanatory Memorandum:

In the first place, the rules of the Civil Code are primarily written for relationships which are ruled by private law. This implies that these rules do not necessarily apply in the area of administrative law. In the second place, the guideline is that despite this distinction, unnecessary differences between administrative law and private law should be avoided.<sup>26</sup>

The first two sentences immediately express the fundamental difference with the approach of the general law and mixed law doctrines. First, the premise here is that the rules of the Civil Code and the rules of administrative law each have their *own* nature. This differs from the general law doctrine, in which the distinction between public and private is a matter of lesser significance. On the contrary, here the distinction is underlined and taken as a starting point: according to the legislator, the rules are each primarily valid for their own area of law. This is also quite a difference with the core of the mixed law doctrine, which doubts the usefulness of a fundamental distinction of the law in two broad areas. Moreover, the mixed law doctrine emphasizes the mix of public law and private law and stresses the possibility of applying legal rules in another area than originally intended.

---

<sup>26</sup> Kamerstukken II 2003/04, 29 702, No. 3, p. 14. Kamerstukken II means Parliamentary Documents, Second Chamber.

The quotation above is no more than a basic premise with possible exceptions. The assumption taken by the legislator does not exclude that in certain cases the rules of one area of law may be applied analogously in another area.<sup>27</sup> Specific linking provisions (*schakelbepalingen*) in the Civil Code and in the GALA provide an explicit basis for this.<sup>28</sup>

The second guideline in the quotation – unnecessary differences between administrative and private law should be avoided – also deserves attention. The assumption that the two major areas of law essentially are both of a very different nature, does not exclude that there are common legal rules that apply in both areas of law. The Explanatory Memorandum of the GALA emphasizes that it should be encouraged to apply, as much as possible, *common* rules in both areas.<sup>29</sup> By these common rules are meant common legal premises and common legal concepts, broad legal terms, general legal principles and (very) general legal rules.

The approach of the legislator at the occasion of the GALA can be depicted as follows:

General law = Common law	
Public law	Private law

### **Common Law**

#### *b. The Administrative Court: General Principles*

We also explicitly meet the new approach of the public-private law divide in the case law of the Dutch administrative courts. Specific reference must be made to the tendency of the Administrative Law Division of the Council of State, classifying certain administrative acts as public law acts – even if a statutory basis is lacking. This line of reasoning started in 1996/1997. It especially concerns administrative decisions concerning claims for compensation and reclamation. They are now considered to be *public* law actions, whereas

<sup>27</sup> Kamerstukken II 2003/04, 29 702, No. 3, p. 15, 16.

<sup>28</sup> Kamerstukken II 2003/04, 29 702, No. 3, p. 16.

<sup>29</sup> Kamerstukken II 2003/04, 29 702, No. 3, p. 16.

previous to this case law they were considered to be *private* law actions of the government.

This new approach works as follows. Public law acts – administrative decisions as mentioned in section 1:3 GALA – are generally based on a specific statutory basis that expressly grants the power to act to an administrative authority. However, this is not always necessary. Instead of a statutory basis the administrative court accepts that administrative decisions are based on *principles* of public law. Thus, the Administrative Law Division traces very general principles of law – this means: principles of law which are both applicable in public law and private law – and subsequently determines to what extent those principles are of a public law nature. In the well-known Van Vlodrop case, the Administrative Law Division ruled that the power of an administrative authority to decide on a compensation claim for unlawful use of statutory powers is based on general legal principles expressed in section 6:162 of the Civil Code and section 8:73 of the GALA. According to this general legal principle, an actor who is accountable for a wrongful act (tort) or omission which causes damage, is obliged to compensate the aggrieved party. This is a general legal principle which exists in both public and private law. The Administrative Law Division should therefore still indicate when this principle is of a public law nature. The same court has ruled that a general legal principle is of a public law nature when it takes effect in a legal relationship that derives from the exercise of a public power.<sup>30</sup> In short, the Administrative Law Division requires that two conditions are met to regard an extra-statutory action of an administrative authority as a public law decision as understood in the GALA: it should be based on a *principle* of public law and there should be a *relationship* of public law.<sup>31</sup>

Before the development of this kind of case law, the administrative courts did not consider the reactions of the administration on an application for compensation of damages as public law decisions but as private law reactions of the government. By then, these replies were only held to be public law decisions when there was a statutory basis or the reply was regulated by general policy rules. That – old – approach fits within the general law doctrine: private law is applicable, unless public law provides its own special regime.

The new approach can be depicted as follows:

---

<sup>30</sup> ABRvS 6 mei 1997, AB 1997, 229 m.nt. PvB (*Van Vlodrop*). ABRvS is the abbreviation for Afdeling Bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State).

<sup>31</sup> A (third) aspect which we can leave aside, is that the decision about the damages is only amenable to judicial review when the damage causing decision is also amenable (the so-called requirement of formal connexity).

The general legal principle that the actor who is accountable for a wrongful act (tort) or an omission which causes damage, is obliged to compensate the aggrieved	
Public law relationship (section 8:73 GALA)	Private law relationship (section 6:162 CC)

### Principle of Wrongful Act (Tort)

The principle of wrongful act is certainly not the only general legal principle on which the Administrative Law Division based the public law character of a decision in the sense of section 1:3 GALA. The Administrative Law Division also uses the same approach regarding undue payment<sup>32</sup> and unjust enrichments.<sup>33</sup> The legal obligations to repay undue payments or unjustified enrichments – traditionally rooted in private law – are considered to be based upon general law principles, which overarch both private and public law. This new approach is also applicable with other general principles of law. For instance, the principle of legitimate expectation seems to be a good candidate. This principle has to be considered as an outstanding example of a general legal principle that domes administrative and private law, and can produce different effects in both areas when necessary.<sup>34</sup>

#### c. *General legal concepts*

This new approach is not only suitable for being applied to general legal principles, but also to general legal concepts. When we state that the principle of wrongful act is a general principle of law, which can produce its typical effects depending on the context both in public law and private law, then we can obviously also state the same of the *concept* of the wrongful acts. Thus, the concept of wrongful act is a general legal concept, which depending on the legal relationship in which it occurs has a public law or private law nature. The wrongful governmental act occurs especially in a public law relationship when the wrongful act, being the cause of the damages, is of a public law character. This is the case when the unlawfulness is caused by a public law action. One could think of an improperly granted or revoked license or an unlawful generally

<sup>32</sup> ABRvS 21 October 1996, AB 1996, 496, m.nt. NV (*Nanne*).

<sup>33</sup> ABRvS 26 August 1997, AB 1997, 461, m.nt. NV.

<sup>34</sup> The Supreme Court also supposes that the principle of legitimate expectations can be elaborated in a different way in public law and private law, see: HR 8 July 2011, AB 2011, 298, m.nt. F.J. van Ommeren & G.A. van der Veen (*Etam c.s v. Zoetermeer*).

binding regulation. In addition, the government can also commit a wrongful act in a private law relationship. In a picture, it would look like this:

Wrongful governmental acts	
Wrongful governmental act in a public law relationship	Wrongful governmental act in a private law relationship

**Concept: Wrongful Governmental Act**

*Governmental contract* can be considered a concept in a similar way. In the approach of this doctrine the concept of contract is a general legal concept, which, depending on the kind of legal relationship, can produce effects in public law or in private law. A contract about the use of statutory public law powers (e.g. on the power to issue a license) – in other words: a public power contract – is of a public law nature and constitutes a public law relationship.<sup>35</sup> However, governmental contracts concerning governmental property rights are of a private law nature. In a scheme:

Governmental contract	
Public power contract	Private power governmental contract

**Concept: Governmental Contract**

<sup>35</sup> In Dutch administrative law literature the public power contract is considered to be of a public law nature, *see i.a.* Schlössels & Zijlstra, 2010, p. 865 and H.D. van Wijk, W. Konijnenbelt & R.M. van Male, *Hoofdstukken van bestuursrecht*, 15<sup>th</sup> edn, Amsterdam, Reed Business, 2011, p. 241.

To avoid misunderstandings, it does not automatically follow from the labels 'public law' and 'private law' which kind of court is competent: the administrative or the civil court. In many public law relations in Dutch law, the civil court is competent, because the dispute does not concern a public law decision that is amenable to appeal before the administrative court.<sup>36</sup>

*d. Literature*

As well as the general law and mixed law doctrines, this new approach is reflected in academic literature. In particular, Scheltema & Scheltema have chosen both premises of the legislator, quoted above, as a starting point of their extensive reflections on the interaction of public law and private law.<sup>37</sup> They do not stand alone in this. Public law and private law can be considered as independent distinguishable areas of law. They can fulfil different functions in a different context. However, this does not detract from the fact that it is important for the coherence of the legal system to search for common legal principles and premises as much as possible.<sup>38</sup> Scheltema & Scheltema draw some consequences from their approach as to the applicability of the law in legal relationships. When the government performs a public law action, this action is ruled by the rules of public law: in principle the rules of private law are not applicable. However, this does not exclude the possibility that some rules of private law can be applied more freely by way of analogy. For example, section 6:162 of the Civil Code contains some requirements of liability: unlawfulness, accountability, causation and damages; section 6:163 Code Civil adds an extra requirement, the so-called relativity (*relativiteit* / *Schutznorm*). Scheltema & Scheltema consider the rules of section 6:162 of the Civil Code inapplicable in case of governmental liability for nullified decisions – at least so far as the unlawfulness and the accountability are concerned.<sup>39</sup> This gives the judge the opportunity to give his own interpretation to the liability standards, not only to the unlawfulness and accountability, but also to the requirements of causation

---

<sup>36</sup> Or because the Civil Court makes an exception of the so-called doctrine of formal legal force (*formele rechtskracht*) of administrative actions – specifically with compensation of damage because of a wrongful governmental act, *see* HR 17 December 1999, AB 2000, 89 m.nt. PvB; AB Klassiek, 6<sup>th</sup> edn, Nr. 33, 2009, m.nt. P.J.J. van Buuren (*Groningen v. Raatgever*).

<sup>37</sup> M. Scheltema & M.W. Scheltema, *Gemeenschappelijk recht. Wisselwerking tussen publiek- en privaatrecht*, 2nd edn., Alphen aan den Rijn, Kluwer, 2008, p. 4.

<sup>38</sup> *See particularly* J.H. Nieuwenhuis, 'Op gespannen voet. Een evenwichtstheorie over de betrekkingen tussen het publieke en het burgerlijke recht', *NJB* 1998, p. 9 *et seq.* and more recently W. van Gerven & S. Lierman, *Algemeen deel. Veertig jaar later*, Mechelen, Kluwer, 2010, p. 524.

<sup>39</sup> Scheltema & Scheltema 2008, p. 323. As they note themselves, their position is 'not fully undisputed' ('niet geheel onomstreden').



and relativity. On the other hand, for the unlawful private law governmental action, this does not apply.

According to Scheltema & Scheltema something similar goes for the legal rules on governmental contracts. In their eyes, the public power contract is entirely governed by rules of public law.<sup>40</sup> They do not regard the rules of the Civil Code applicable to these type of contract, although they do not completely exclude the application of the rules of the Civil Code by way of analogy. On the other hand, the rules of private law are naturally directly applicable to private power contracts of the government.

It is important to keep in mind that the *civil courts* have not clearly embraced (these consequences of) this new approach of the public-private law divide, although one can find traces of this new approach in their case law as well.<sup>41</sup> This lack of clarity is also caused by the fact that the civil courts do not always expressly articulate when they apply the rules of the Civil Code directly or by way of analogy.

*e. The Label: Common Law Doctrine*

All in all, the difference is that the legal principles and legal concepts, which in the general law doctrine were considered *typically as of a private law character*, are in this new approach considered as *general* principles and legal concepts, which depending on the character of the legal relationship in which they are applicable, are regarded to be of a public law or private law nature. This is especially important because in this way they can receive their own interpretation and implementation within their own legal relationship; so apparently it turns out that public law and private law are two separate worlds in principle, each with his own nature and characteristics.

A generally accepted *label* does not exist for this new law doctrine on the public-private law divide. As a result of the case law of the Administrative Law Division, this new approach is referred to as the 'the *new* general law doctrine'<sup>42</sup> or 'the *real* general law doctrine',<sup>43</sup> but these expressions until now have had rather little impact.<sup>44</sup> I would like to label this new law doctrine as the 'common law doctrine'. The reason being that this label clearly expresses an essential aspect of this law doctrine: there is a general part of the legal system which

<sup>40</sup> Scheltema & Scheltema 2008, p. 190 *et seq.* This is disputed as well.

<sup>41</sup> Cf. B.J. Schueler, 'Gemeenschappelijk recht. Wisselwerking tussen publiek- en privaatrecht', *Overheid & Aansprakelijkheid*, No. 59, 2004, p. 131.

<sup>42</sup> See the case comment of P.J.J. van Buuren under *Alpha* ABRvS 29 November 1996, AB 1997, 66.

<sup>43</sup> L.J.A. Damen, Het legaliteitsbeginsel als partieel gecodificeerde constitutionele norm, in H.R.B.M. Kummeling *et al*, *Het bestuursrecht als agenda voor het staatsrecht*, Deventer, W.E.J. Tjeenk Willink, 1999, p. 56.

<sup>44</sup> Van Wijk, Konijnenbelt & Van Male 2011, p. 407 considers this approach as part of the mixed law doctrine.

actually stands above the division of public law and private law as a truly *common* part of the law.<sup>45</sup>

### 3.3 *The Fill-in Law Doctrine*

In response to the general law and the mixed law doctrines, other far-reaching alternatives are also proposed. In literature, especially the fill-in law doctrine ('invullende rechtsleer') of the Maastricht School received much attention. Tak is the founding father of this theory.<sup>46</sup> The fill-in law doctrine is in harmony with the common law doctrine in as far as a sharp separation between public law and private law is also the essential premise here. Furthermore, this law doctrine also seeks common law principles. Aside from this, however, each of these theories diverge. The fill-in doctrine goes a step further while objecting to the use of private law instruments by the government, although this is accepted under current positive law (section 2:1 of the Civil Code). This law doctrine fundamentally disputes the possibility that the government can derive private powers from the Civil Code in order to serve public interests.<sup>47</sup> This doctrine calls itself a 'fill-in' doctrine because, on close analysis, when the government uses private law instruments, in this approach these instruments are actually considered to be unwritten public law actions. The law fills in the gaps, which the written public law has left. This is not a case of osmosis, such as the mixed law doctrine stated, but of absorption. The Civil Code offers no foundation but merely a fill-in standard. According to the fill-in law doctrine the rules of the Civil Code actually get absorbed by public law rules when applied to governmental actions.<sup>48</sup>

Literature offers a few other doctrines on the public-private law divide.<sup>49</sup> But it is not necessary to discuss them all here. While the common law doctrine, as it turned out, has many connections with actual positive law, the fill-in doctrine and the other proposed law doctrines still have the nature of relatively extensive theoretical *desiderata*.

---

<sup>45</sup> The meaning of 'common law' in this sense differs from 'common law' as a designation for the law of Anglo-American countries.

<sup>46</sup> A.Q.C. Tak, 'Overheid en Burgerlijk Wetboek, Naar een invullende rechtsleer', *Recht en Kritiek*, 1993, p. 174 *et seq.* and A.Q.C. Tak, *De overheid in het burgerlijk recht*, Den Haag, VUGA 1997, p. 105 *et seq.* This doctrine is mainly supported in the modern administrative law literature by Schlössels & Zijlstra 2010, p. 525.

<sup>47</sup> See also Schlössels & Zijlstra 2010, p. 520.

<sup>48</sup> Tak 1993, p. 189.

<sup>49</sup> See for an overview: Schlössels & Zijlstra 2010, p. 503-526.

#### 4. Explanatory Factors

Why is there a demand for alternative views on the public-private law divide? In my opinion, there are two problems with which the traditional general law doctrine confronts us:

- First, erroneously it does not make a fundamental distinction between the nature of the applicable rules of private law and of administrative law.
- Second, erroneously it considers the rules of private law as the rules of general law and it regards the rules of administrative law as special law rules.

The identification of the general law with private law is known in modern civil literature as a 'tactical blunder'.<sup>50</sup> This observation seems entirely appropriate to me, but with hindsight it is a cheap shot. At the beginning of the last century, there were almost no existing rules of administrative law and there were still no separate general administrative courts. It should hardly be surprising that these circumstances determined the views of Paul Scholten and his contemporaries. The general law doctrine fits well in a system in which a separate general administrative court is absent. Before the introduction of a general administrative court system the general law doctrine was a necessary condition for the civil court to offer legal protection against governmental actions. For such legal protection, it was necessary that the Civil Code – by then: especially section 1401 Civil Code (old) – could be applied to all governmental actions, irrespective of their public law or private law nature.

Against this background, I recognize mainly two explanatory factors for the current quest for alternative views on the public-private law divide: first of all, the strong rise and growing significance of administrative law legislation and secondly, the branch of separate general administrative courts which was created. Together, these developments led to a much more influential position of administrative law in the Dutch legal system. They have contributed to the fact that the general law and mixed law doctrines no longer offer an adequate view of the public-private law divide. Although much could be said about these developments, I can only make a very brief comment here on both.

The huge wave of administrative law *legislation* dates from after World War II. Nowadays, roughly estimated, about 80 percent of Dutch legislation has an administrative law character. Furthermore, and that is just as important, nowadays it turns out that administrative law statutes have a fundamentally different nature compared to private law legislation. A characteristic of most of administrative law legislation is that it *confers decision-making powers* to

---

<sup>50</sup> Nieuwenhuis 1998, p. 16.

administrative authorities: the power to unilaterally impose commands and prohibitions, to issue licenses and to grant subsidies and to enforce certain legal obligations with administrative sanctions. Although both administrative law legislation and private law legislation intend to affect the behaviour of the citizens, the administrative law legislation usually realizes this in a different way than private law legislation. Whereas private law legislation contains many rules of conduct and a relatively limited number of decision-making rules, the administrative law legislation almost completely consists of decision-making rules.<sup>51</sup> This fundamental difference is fully overlooked by the general law and mixed law doctrines.

The current role of the *administrative courts* together with the distribution of the competences between the civil court and administrative court are also relevant for the applicable law. In principle, it is conceivable that both civil and administrative courts apply rules of public law and private law. This premise fits in the mixed law doctrine. Furthermore, this also happens in practice. For example, the civil courts apply the general principles of proper administration, but it is rare for the administrative courts to apply the rules of the Civil Code.<sup>52</sup> In Dutch day-to-day legal practice, the administrative courts apply administrative law rules and deliver their contribution to the development of these rules, while the civil courts apply the rules of private law. I consider that the strong development of the administrative court system in the second half of the 20th century contributed to the clear-cut separate position of administrative law in the legal system and has strengthened the premise that administrative law rules are of a fundamentally different nature than the rules of private law. The evolution of administrative law brought along its own court – the administrative court, which tests especially whether the government has acted in accordance with the administrative rules and principles. This separate kind of court is therefore a second reason to leave behind the traditional view of the public-private law divide. Perhaps it is no coincidence that it was especially the administrative court which made judgments that fitted very well within the common law doctrine, even before the legislature postulated this view.

Finally, I would like to briefly comment on the above-mentioned *fill-in law doctrine*. There is an additional explanation for the proposals of this doctrine. This doctrine is based on the fundamental objection to governmental private law acts. According to the fill-in law doctrine, the government has too much space to use private law instruments. This doctrine aims at limiting the use of private law powers by the government. This is a more specific issue, which should be

---

<sup>51</sup> A.M. Donner, *Nederlands bestuursrecht. Algemeen deel*, 5th edn, Alphen aan den Rijn, Samsom H.D. Tjeenk Willink, 1987, p. 72 *et seq.*

<sup>52</sup> However see for instance: CRvB 1 August 2000, JB 2000, 260 and ABRvS 3 July 2002, JB 2002, 242. CRvB means Centrale Raad van Beroep (Central Appeals Tribunal).

researched independently of the preceding: by leaving behind the traditional views on the public-private law divide and by accepting the common law doctrine, little is still said about what extent it should be allowed that the government acts by means of private law instruments.

## 5. From Macro Level to Meso Level: the Governance-Sectors

### 5.1 *The Multi-Layered Legal Structure of a Governance-Sector*

It is time to return to the Law and Governance-approach. It is important to keep in mind that the public-private law divide – as described and explained in the preceding sections – is not only perceptible in law in general but also on the level of the law which is applicable in certain policy-sectors of the society. The Law and Governance-approach works well on the level of the policy-sectors. This is obvious, because in a Law and Governance-approach, among other things, the law in the public domain per definition is focused on realizing certain public or social purposes.<sup>53</sup> In our society these purposes almost automatically are connected to certain policy-sectors.

In other words, we can study the law on different levels of abstraction, namely on macro, meso and micro level. To be clear in this context, the following is meant:

- Macro level concerns the composition of the law in *general*.
- Meso level concerns the composition of the law which is applicable in a certain *policy-sector*.
- Micro level concerns the composition of the law which is applicable in a *concrete case*.

Until now, this contribution was focussed on the public-private law divide on a macro level. To see how these considerations are related to the law and governance-approach, it is useful to take a look at the law at a meso level. I only mentioned the law on a micro level for the sake of completeness.

Under a *governance-sector*, I understand a sector in the public domain that is the subject of a certain policy.<sup>54</sup> A distinctive feature of a governance-sector is its goal-oriented aspect. The law in a governance-sector is focussed on the realisation of certain public or social purposes. The policy determines the purpose. Examples are education, healthcare, energy supply, public housing, public transport, etc. Since policy in a certain sector aims to realize certain

---

<sup>53</sup> See Van Ommeren 2014.

<sup>54</sup> See more extensively on the nature of governance-sectors: Van Ommeren 2014.

public or social policy goals with legal means, we could truly call these sectors, governance-sectors *of law*.<sup>55</sup>

A characteristic of a governance-sector is that not only the government is steering: the chosen purposes can be realized by other actors. As stated before, private institutions can also exercise a public function. I mentioned earlier the housing corporations, (private) educational institutes and (private) healthcare services (section 2.2), but these examples are easily completed with others such as environmental organisations, private energy-suppliers and private institutions which perform public transport.

Both public *and* private law can be part of a governance-sector. The law in a governance-sector is of an instrumental character. It aims to realize the purposes of the governance-sector. The legal instruments can be both of a public or private law nature. It is a characteristic feature of governance-sectors of law that they are composed of a mix of public law and private law elements, which can be applicable at the same time.

Governance-sectors do not exclusively consist of their own public rules and their own private rules with public law or private law instruments. In a governance-sector of law, naturally *general* legal rules are also applicable – the general administrative law rules and the general private law rules. What is more: there is also a top-layer. As demonstrated in the preceding sections, there also are very general premises, principles of law, legal rules and concepts that are common to public law and private law. This means that in a governance-sector, the multi-layered structure of law should be depicted at least as a unity that consists of three layers. Top-down, apart from the common law rules, the general public and private law rules, there are also the sector-specific public law and sector-specific private law rules. In a picture, this is represented as follows.

---

<sup>55</sup> In the Netherlands sometimes referred to as the so-called *functionele rechtsgebieden* (functional areas of law). See P. de Haan, 'Functionele vakken als dwarsdoorsneden van publiek- en privaatrecht', *Ars Aequi*, 1987, p. 361 *et seq*; C.A. Groenendijk, 'Ouderenrecht, functionele rechtsgebieden en discriminatie', *Ars Aequi*, 1988, p. 615 *et seq*; De Haan 1988, p. 104, 105 and Schlössels & Zijlstra 2010, p. 71.

General law = common law	
General public law rules	General private law rules
Sector-specific public law rules	Sector-specific private law rules

### **The Law in a Governance-Sector**

#### **5.2 The Public-Private Law Divide in a Governance-Sector**

It is no coincidence, of course, that inside a governance-sector the law is structured in the same way as the law in general. From a macro level point of view, the shape of the law is not very different from the meso level point of view of a governance-sector. Thus, a governance-sector contains public law rules and private law rules and on top of this there are general rules. Inside a governance-sector, the relationship between these legal rules should not be approached in any different way than generally. In principle, within a governance-sector the general administrative law rules apply to the administrative law instruments and the private law rules to the private law instruments.

The advantage of performing these analyses identically on both levels is that this is conducive to the coherence of the study of law. It facilitates the analysis of the legal system. Moreover: it is possible to respect the consequences that the law attributes to the public-private law divide.

Above I have already noted the considerable increase of administrative law legislation, particularly since World War II (section 4). This increase of legislative legal rules – and nowadays also: extra-legislative legal rules – is particularly demonstrated in the governance-sectors. This development originates from a strong belief in the social change that can be effected by governmental policies and from a visible role for the State. A common expression for this is the ‘regulatory state’.<sup>56</sup>

<sup>56</sup> Cf. C. R. Sunstein, *After the Rights Revolution. Reconceiving the Regulatory State*, Cambridge Mass, Harvard University Press, 1990.



For a clear analysis of the law in a governance-sector it is important to map out the regulatory scheme, which is neither a small nor easy task. There are two general points of reference: the composition of the public law and private law elements and the composition of the specific – this means: characteristic for the governance-sector itself – and general elements.

Thus, this is why it is important to detect the public law and private law elements in each governance-sector of law as much as possible and to disentangle the various legal relationships in this sector. The answers to questions about the applicability of the rules, the enforcement of the rules and the judicial protection can be based on this analysis.

However, it is impossible to make this analysis without mapping out which premises, principles, rules and elements are indeed *general* – which means: which rules, elements etc. are applicable in *various* governance-areas of law – and in this sense are *common* and transcend these sectors. It is also important to bring into focus the extent rules and elements need to deviate from the general law and have their own specifications for the governance-sector of law at stake. In a 'Law and Governance-approach' the relationship between general and specific rules (rules deviating from the general law and which are only applicable in the governance-area) becomes extra relevant.<sup>57</sup>

In my opinion, the shift from government to governance in the public domain promotes the search for general premises, legal principles and concepts that are valid in the whole of the legal system and so could really be called 'general'. However at the same time this does not relieve us from the differences between the public and private law elements of a governance-sector and oblige us to identify the legal consequences that are ascribed to these differences.

## 6. Summary and Conclusions

Public law and private law are – together with the general part of the law – part of a multi-layered legal order. The depictions above illustrate this. The difference between the traditional and the modern views on the public-private law divide is that nowadays the starting point is that private and public law, in principle, are considered to be of a fundamentally different nature.

Moreover, our legal order consists of a set of general premises, legal principles and legal concepts that occur throughout the law, both in public law and private law. These general legal principles and legal concepts can produce, where necessary, their own different effect in public law and private law. It is no longer necessary to consider the general legal principles and legal concepts as of a

---

<sup>57</sup> See Van Ommeren 2014.